SUPREME COURT, U. S.
JUL 16 1974
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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1973

Case No. 73-2030

DAVID S. HEDDEN,

Petitioner

vs.

THE STATE OF FLORIDA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

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TO THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, David S. Hedden, respectfully prays that a Writ of Certiorari issue to review the judgment of the District Court of Appeal of Florida, Second District, entered in this proceeding on the 19th day of December, 1973. References are to the appendix included as a part of this Petition.

OPINION BELOW

The opinion of the District Court of Appeal of Florida, Second District, appears at 287 So.2d 179 (A-1). The memorandum decision of the Florida Supreme Court denying Petitioner's Petition for Writ of Certiorari on April 18, 1974, appears at 294 So.2d 89 (A-1).

JURISDICTION

The judgment of the District Court of Appeal of Florida, Second District, was entered on December 19, 1973. A timely Petition for Writ of Certiorari was filed with the Florida Supreme Court and was denied on April 18, 1974. This Petition for Writ of Certiorari was filed within ninety (90) days of the denial of Petitioner's Petition for Writ of Certiorari by the Florida Supreme Court. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTION PRESENTED

Whether physical evidence derived from statements made by Petitioner during police interrogation without *any Miranda* warnings shall be excluded at a subsequent criminal trial.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:
"No person shall be ... compelled in any criminal case to be a witness against himself ..."
United States Constitution, Fourteenth Amendment:
"No state shall make or enforce any law which shall abridge the privileges or immunites of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law ..."

STATEMENT OF THE CASE

This Petition for Writ of Certiorari seeks review of the decision of the District Court of Appeal for the Second District, State of Florida, affirming the judgment entered on jury verdict finding Petitioner guilty of first degree murder.

Petitioner presented the District Court of Appeal of Florida, Second District, with, *inter alia*, the following points of law:

> THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE WHERE THE INFORMATION LEADING TO THE DISCOVERY OF THAT EVIDENCE WAS OBTAINED DURING THE COURSE OF DEFENDANT'S INTERROGATION AND SUBMISSION TO POLYGRAPH TESTS AT THE LEE COUNTY SHERIFF'S OFFICE AT A TIME WHEN DEFENDANT WAS THE NUMBER ONE SUSPECT IN THE CASE AND WHEN CONCEDELY DEFENDANT WAS NOT ADVISED OF HIS CONSTITUTIONAL RIGHTS TO REMAIN SILENT OR TO HAVE COUNSEL.

On December 19, 1973, the District Court of Appeal of Florida, Second District, affirmed Petitioner's conviction, PER CURIAM.

REASONS FOR GRANTING THE WRIT

Physical evidence derived as a result of violation of the prophylactic rules established in Miranda must not be used in a subsequent criminal trial.

On June 29, 1972, two fishermen found the body of Laisley Minor Crawford floating in the Caloosahatchee River. Mr. Crawford had been shot to death with a small caliber weapon. Examination of the projectiles found in his body indicated that they had been fired through a weapon equipped with a silencer.

Mr. Crawford was Petitioner's next-door neighbor. Officer Clingenpeel, the chief investigating officer, learned on July 3, 1972, that Petitioner told a druggist prior to the death of Mr. Crawford that a neighbor had killed his alligator, and that he was going to get him for it. Chief Investigator Clingenpeel also was advised that Petitioner had ruined one .22 caliber pistol making a silencer for it, but that Petitioner had another one. (A-2).

With the knowledge that Petitioner

1. Had threatened to kill his neighbor;
2. Had supposedly ruined one .22 caliber pistol making a silencer, but had another pistol;
3. Lived in the house adjacent to the residence of the decedent; and
4. Had, by previous admission, been near the scene of the crime at the time the murder was committed,

Chief Investigator Clingenpeel arrived at Petitioner's home on July 4, 1972, to "interview" Petitioner. Chief Investigator Clingenpeel admitted that prior to the "interview" Petitioner was at the top of his list of suspects. (A-5).

Petitioner and his wife were invited to accompany the officers to the Lee County Sheriff's Department for questioning. Petitioner was kept isolated in a small room for nearly an hour while his wife was interrogated by the police. Petitioner was then taken from the room where he had been kept into another room in the same building where he was interrogated by Chief Investigator Clingenpeel and two other police officers. (A-5).

During the course of the interrogation at the police station, the police learned that Petitioner owned certain weapons. At the conclusion of the polygraph examination, the police "requested" Petitioner to return with them to Petitioner's home for the purpose of surrendering the weapons. While waiting, the police asked Petitioner if he had any objection if they "looked

around" and Petitioner, who had still not been advised that he was a suspect, and who had not been given *Miranda* warnings, made no objection to the request.

While looking around, the police found a blood-stained blanket in the back of a van owned by Petitioner. The police took the blanket and the weapons from Petitioner.

At no time on July 4, 1972, prior to his interrogation, after his interrogation, and prior to the seizure of the evidence obtained as a result of that interrogation, was Petitioner advised that he was a suspect or was he given the warnings contemplated by this Court in *Miranda*.

The decedent's blood was type A, Rh negative. The deceased had been shot four times with a small caliber weapon which had been equipped with a silencer.

The blood on the blanket was established to have been type A, Rh negative. One of the weapons taken from Petitioner was a small caliber weapon which appeared to have been earlier equipped with a silencer.

Petitioner was indicted on August 16, 1972 and charged with the crime of first degree murder. On the same day, Petitioner filed appropriate motions to suppress evidence, asserting that the State's proposed use of certain evidence directly infringed upon Petitioner's right against compulsory self-incrimination. The trial court ultimately denied Petitioner's motion to suppress and rejected Petitioner's argument that use of the evidence abrogated Petitioner's right to due process of law. (A 6-8).

In denying Petitioner's motion to suppress evidence and in overruling Petitioner's objection to the introduction into evidence of the pistol and a blood-stained blanket, the trial

judge held that in order for the police to be under any obligation to give the warnings required by *Miranda*, the accused must have been first arrested; an in-custodial interrogation is not within the reach of *Miranda* if there is neither arrest nor physical restraint. Affirmance of the trial court's disposition by the District Court of Appeal is erroneous since the principle is in conflict with the principles established by this Court in both *Escobedo v. Illinois*, 378 US 478, 12 L.Ed. 2d 977, 84 S.Ct. 1758 (1964) and *Miranda v. Arizona*, 384 US 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966).

Escobedo held that the critical point in effecting protection of a citizen's constitutional rights occurs when "...the investigation is no longer a general inquiry into an unsolved crime, but has begun to focus on a particular suspect. ..." 378 US at 492, 84 S.Ct. at 1765

The undisputed evidence before the trial court is susceptible to no conclusion other than that the police inquiry into an unsolved crime had changed from a general investigation and had focused on Petitioner at the time of his interrogation. Notwithstanding Petitioner's objection that the physical evidence thus seized had been obtained as a direct and proximate result of the rules established by this Court in *Miranda*, Petitioner's motion to suppress the evidence thus seized was denied and his objection to the introduction of the evidence at trial was overruled.

Petitioner contends that violation of the prophylactic rules established by *Miranda* requires exclusion of the physical evidence obtained as a result of a post-*Miranda* in-custodial interrogation. The question before this Court therefore relates to the judicial consequences of police disregard of procedural safeguards established by *Miranda* for protection of the Fifth Amendment right against self-incrimination.

The police conduct complained of here does not actually infringe upon Petitioneer's Fifth Amendment rights, but constitutes a departure from the standards established by this Court in *Miranda* to safeguard the privilege. The question not reached by this Court in *Michigan v. Tucker*, Case No. 73-482, Vol. 42, No. 48, page 4887, United States Law Week, is now before this Court: Is evidence derived from statements taken in violation of the *Miranda* rules to be excluded? Since *Silverthorne Lumber Company, Inc. v. United States*, 251 US 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920), this Court has held that a state may not prove its case either through illegally obtained evidence or any derivative thereof. As stated by Mr. Justice Holmes in the Silverthorne case:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course, this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed."

Ibid., 251 US at page 392, 40 S.Ct. at page 183.

The exclusionary rule was made applicable to the states in *Mapp v. Ohio*, 367 US 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961).

The exclusionary rule was further developed in *Wong Sun v. United States*, 371 US 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963). There, testimonial evidence had been elicited from the petitioner at the time of his illegal arrest which led the police to narcotics. It was held that the testimonial evidence was inadmissible and should have been excluded. The fruits of a Fourth Amendment violation were thus held inadmissible. This

Court further held that the narcotics which had been obtained as a result of Toy's unlawfully obtained statement should have been excluded as a fruit of the original arrest.

The weapon and the blood-stained blanket were obtained as fruits of the original unlawful interrogation, and, under this Court's prophylactic rules established in *Miranda*, should have been excluded.

In *United States v. Wade*, 388 US 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967) and *Gilbert v. California*, 388 US 263, 87 S.Ct. 1951, 18 L.Ed. 2d 1178 (1967), this Court held that an in-court identification by a witness who had viewed the defendant-petitioner in a lineup before trial in the absence of counsel violated the accused's Sixth Amendment right and should have been excluded from trial. This Court recognized that had the in-court identification not been based on a previous lineup, but had been independent, the in-court identification would have been proper. The case was remanded to give the prosecution an opportunity to demonstrate that the in-court identification was made independently of pre-trial lineup.

Gilbert becomes relevant because this Court went on to state that the testimony of witnesses at a trial that they had identified the defendant at a pre-trial lineup must be excluded since the lineup with respect to which they testified was illegal. In excluding that testimony, this Court noted:

> "That testimony is the direct result of the illegal lineup 'come at by exploitation of (the primary) illegality.' The state is therefore not entitled to an opportunity to show that that testimony had an independent source. Only a *per se* exclusionary rule as to such testimony can be an effective sanction to insure that law enforcement authorities will respect the accused's constitutional rights to the presence of his counsel at the critical lineup. ...(T)he desirability of deterring the constitutionally objectionable

practice must prevail over the undesirability of excluding relevant evidence. *cf. Map v. Ohio*, 367 US 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081. ..."

Ibid., 388 US at pages 272-273.

In *Harrison v. United States*, 392 US 219, 88 S.Ct. 2008, 20 L.Ed. 2d 1047 (1968), this Court stated:

"The petitioner testified at trial only after the government had illegally introduced into evidence three confessions all wrongfully obtained, and the same principle that prohibits the use of confessions so procured also prohibits the use of any testimony impelled thereby — the fruit of the poisonous tree, to invoke a time-worn methaphor."

Ibid., 392 US at page 222.

In *Tucker v. Michigan, supra*, this Court recognized that:

"The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in wilful, or at the very least, negligent conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instil in those particular investigating officers, or in their future counterparts, a greater degree of care toward the right of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

Ibid., 42 L.W. at page 4891. Continuing, the Court noted:

"Although we have been urged to resolve the broad question of whether evidence derived from statements taken in violation of the Miranda rules must be excluded regardless of when the interrogation took place, we instead place our holding on a narrower ground. For at the time respondent was questioned these police officers were

guided, quite rightly, by the principles established in *Escobedo, supra,* particularly focusing on the subject's opportunity to have retained counsel with him during the interrogation if he chose to do so. ..."

Ibid., 42 L.W. at page 4891.

The unresolved question in *Tucker v. Michigan, supra;* i.e., whether evidence derived as a result of a violation of the prophylactic rules established in *Miranda* may be used in a subsequent criminal trial is now before this Court. Petitioner contends that such evidence must be excluded.

CONCLUSION

The decision of the trial court, as sustained by the District Court of Appeal of Florida, Second District, violates the prophylactic rules established by this court in *Miranda*. Because of the importance to the administration of justice in determining the effect of admissibility of evidence seized in violation of the prophylactic standards established by this Court in *Miranda*, a writ of certiorari should issue to review the judgment and opinion of the District Court of Appeal of Florida, Second District.

Respectfully submitted,
GORDON & MANEY, P.A.

David A. Maney

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished by U.S. Mail to Attorney General, State of Florida, 419 Stovall Professional Building, Tampa, Florida this 15 day of July, 1974.

David A. Maney
Attorney

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David S. HEDDEN, Appellant,

v.

STATE of Florida, Appellee.

No. 73-65

District Court of Appeal of Florida,
Second District.

Dec. 19, 1973.

Appeal from Court of Record, Lee County;
William Lamar Rose, Judge.

PER CURIAM.

Affirmed.

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David S. Hedden, Petitioner,

v.

STATE of Florida, Respondent.

No. 44888

Supreme Court of Florida.

April 8, 1974.

Certiorari denied. 287 So.2d 179.

Adkins, C.J., and ROBERTS, BOYD, McCAIN and DEKLE, JJ., concur.

CROSS-EXAMINATION OF OFFICER CLINGENPEEL

"Q: Prior to July 4th or on July 4th prior to going out to David Hedden's address isn't it true that you had spoken to someone who told you that David Hedden was very mad at Mr. Crawford for killing his alligation?

"A: Prior to July 4th?

"Q: Yes, sir.

"A: I can tell you exactly. Yes.

"Q: So then, sir, tell us the date you found that out?

"A: July 3rd.

"Q: Who told you that, sir?

"A: Richard Van Kennerly.

"Q: What did he tell you, sir?

"A: That he was working at Sims and Mr. Hedden came in to purchase some medicine for some possums and during the course of the conversation he mentioned his neighbor had killed his alligator and he was going to get him for it; that he had ruined a .22 making a silencer for it and that he had another one.

"Q: Did he tell you that Mr. Hedden had told him he was going to kill Mr. Crawford?

"A: He did not mention no name. He said a neighbor.

"Q: Did he tell you he was going to kill a neighbor?

"A: A neighbor.

"Q: He did tell you that?

"A: Kennerly?

"Q: Yes.

"A: That is what he --

"Q: That is what he told you on the 3rd, is that not correct, sir?

"A: Right.

"Q: And he also told you he had a gun. Kennerly told you that Crawford had a gun?

"A: Kennerly didn't --

"Q: Strike that. Did Kennerly tell you that Mr. Hedden had a gun?

"A: He told me Mr. Hedden said he had a gun.

"Q: And that was on the 3rd?

"A: Right.

"Q: Did he tell you he had a silencer on it?

"A: He said he ruined a gun making a silencer and he had made a silencer to kill him with it.

"Q: That is what he told you and that was on the 3rd?

"A: That is what he told Kennerly and he reported it to me.

"Q: Did you report that to anyone?

"A: Did I report it to anyone?

"Q: Yes, sir.

"A: Who would I report it to?

"Q: You were in charge, weren't you?

"A: Right.

"Q: What time did you find that out?

"A: 11:45 a.m.

"Q: When did you go out to see Mr. Hedden?

"A: 1:30 p.m. of the 4th.

"Q: You did not go out there on a social visit then, did you?

"A: No On this I went out on the 4th, yes, to interview him.

"Q: In other words, it was not a social visit?

"A: Not a social visit, business.

"Q: You had some idea then from what you heard that Mr. Hedden might have been involved with the killing of Mr. Crawford. Would that not be correct, a correct statement?

"A: I had an idea along with many others.

"Q: About Mr. Hedden?

"A: Yes.

"Q: But you would say he was at the top of your list at the time, wouldn't you?

"A: Could I check something? I think there might be a typographical error on the typing here on this date.

"Q: Would you answer my question?

"A: Okay, *yes.* (Emphasis supplied.)

* * *

EXAMINATION OF PETITIONER

When we got down there they split us up and left me lone for about an hour all by myself in a room and they took her over and questioned her. Then they came and got me and put me in this little tiny room and three of them were there shooting questions at me, you know.

"Q: What kind of questions, David?

"A: Did my wife run around, did she go with Mr. Crawford, did I own guns, what kind of guns, all kinds of questions like that.

"Q: At a fast pace?

"A: Yes, sir.

"Q: Embarrassing?

"A: That is embarrassing, yes. It made me very nervous. Here you are in this little room.

"Q: Did it put you under a lot of tension?

"A: Yes.

"Q: Continue the story, David.

"A: Well, then we finally, when they were through, the men drove us home because they had driven us down

and they drove us back home and we got there, you know, and they asked us if they could see my guns and, certainly, I said, I will have to go into the house, and okay, we went into the house and I got my two guns and Dottie, my wife, got hers.

EXAMINATION OF OFFICER THOMAS J. WALLACE

"Q: Were you present when Mr. Hedden was interviewed?

"A: Yes, sir.

"Q: Would you relate to the jury the contents of that conversation and interview?

"A: Yes, sir.

MR.GOLDBERG: Your Honor, I object to any interview between this officer and any other officers down at the Sheriff's Department which he has already indicated took place without a proper predicate being laid to the extent as to what reason Mr. Hedden was called down there and to the extent they have laid the predicate he was investigating a case; they had called Mr. Hedden down there and that they had advised him of his rights under the law.

MR. D'ALLESANDRO: If it please the Court, an individual is advised of his rights when in the mind of the investigating law enforcement officer we have gone from investigation to interrogation, and that means the person has become a suspect.

THE COURT: Let me ask a question. Was the man in custody at that time or did he just drop in?

THE WITNESS: He was transported to the office by Investigators Clingenpeel and Copithorne, but he was not in custody, Your Honor.

MR.GOLDBERG: I object to this man saying that he was or was not in custody. If this man was not transported to the department by these two officers this man wasn't with him by his own testimony. He is not in position to testify what kind of custody he was in and he is also not in position to testify as to whether or not he was brought in for any specific purpose because he has already testified that this is what he thinks.

THE COURT: Miranda applies to in-custody interrogation and if he was not in custody he does not have to give him his rights.

MR. GOLDBERG: This witness can not establish he was not in custody. The only thing he can establish is that he was brought to the station --

THE COURT: I do not know what the witness can establish. Let's go a little further and find out what he can establish. He said he was present when he was brought in.

MR. GOLDBERG: But he said that the man was brought in by the officers in their car.

THE COURT: He said he was brought there. Ask him was he present when they were brought there?

MR. GOLDBERG: When they were picked up.

THE COURT: I did not use the word picked up. That has not occurred in the testimony yet. Let's don't create something that is not in the testimony. Cover that point, Mr. D'Allesandro.

BY MR. D'ALLESANDRO: (Cont'g)

"Q: Were you present when Mr. Hedden arrived at the CID Station?

"A: Yes, sir.

"Q: Was he in custody to your knowledge?

"A: No, sir.

"Q: Was he handcuffed?

"A: No, sir.

MR. GOLDBERG: Your Honor, I object. That is asking for a conclusion from a witness who does not know that this man was in custody.

MR.D'ALLESANDRO: Your Honor, he has indicated that he was working with these officers. He observed no handcuffs. That calls for no conclusion. That is a direct observation. He knew the man was not in custody. He is working with these officers.

THE COURT: Let's go a little further. After this interrogation was he let go; did he go home?

THE WITNESS: Yes, sir, he was transported home.

THE COURT: Carried back home?

THE WITNESS: Yes, sir.